U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

INDEX

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Date:

JUN - 9 2000

In re: JOSE JESUS GARCIA-IBARRA a.k.a. Jose Jesus Garcia

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Farah Loftus, Esquire

ON BEHALF OF SERVICE: Alan S. Youtsler
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] -
Convicted of controlled substance violation

APPLICATION: Cancellation of removal

The Immigration and Naturalization Service appeals the August 2, 1999, decision of an Immigration Judge which granted the respondent's application for cancellation of removal for certain permanent residents under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a). There is no issue on appeal regarding the respondent's being subject to removal as charged (Tr. at 3). The Service's appeal will be sustained.

Pursuant to section 240A(a) of the Act, an alien who is inadmissible or deportable from the United States may have removal canceled if that alien:

> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years;
>
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
>
> (3) has not been convicted of any aggravated felony.

In *Matter of C-V-T-*, Interim Decision 3342 (BIA 1998), this Board found that in order for an alien to be granted cancellation of removal under this section of the Act, he must meet the above-quoted statutory eligibility requirements, and he must demonstrate that he warrants such relief as a matter

of discretion, pursuant to the standards set out in *Matter of Marin*, 16 I&N Dec. 581, 584-85 (BIA 1978). The standards enunciated in *Matter of Marin, supra*, and subsequently adopted for adjudicating applications for cancellation of removal under section 240A(a) of the Act in *Matter of C-V-T-, supra*, at 6-7, were developed in the context of adjudicating waivers of inadmissibility under section 212(c) of the Act, 8 U.S.C. § 1182(c), the predecessor provision to the cancellation of removal section at issue here. The Immigration Judge found that the respondent met the statutory eligibility requirements, and that he warranted cancellation of removal in the exercise of discretion (I.J. at 7-9).

The sole basis for the Service's appeal is whether the Immigration Judge properly found that the respondent met the statutory eligibility requirement at section 240A(a)(2) of the Act, that being that he has resided in the United States continuously for 7 years after having been admitted in any status. The Service does not challenge the Immigration Judge's decision that the respondent has met the other two statutory eligibility requirements, or that he warrants the relief requested in the exercise of discretion. Therefore we will not further address those findings by the Immigration Judge.

The Service asserts that the Immigration Judge incorrectly counted the period of time the respondent was in the United States under a grant of voluntary departure under the Family Unity Program, as instituted by section 301 of the Immigration Act of 1990, Public Law 101-649 ("IMMACT 90"), and implemented by the regulation at 8 C.F.R. § 236.15(c), in finding that he had accrued the requisite 7 years of residency in the United States. The Service further argues that the 7 years accrual of time should begin with the respondent's arrival in the United States in1994 as a lawful permanent resident, after he returned to Mexico to pick up his immigrant visa. For the following reasons, we agree with the Service's argument that the respondent has not met the 7-year residency requirement for cancellation of removal at section 240A(a)(2) of the Act.

The Service argues on appeal that the Immigration Judge erred in counting the period of time the respondent was in the United States under a grant of voluntary departure under the Family Unity Program as part of the respondent's required 7 years of residency because a grant of voluntary departure does not meet the definition of an "admission" under section 101(a)(13) of the Act, 8 U.S.C. § 1101(a)(13). Section 101(a)(13)(a) of the Act provides: "[t]he terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." A grant of voluntary departure under the Family Unity Program differs from voluntary departure under section 240B of the Act, 8 U.S.C. § 1229c. *See* 8 C.F.R. § 236.15. An alien seeking voluntary departure under the Family Unity Program must file an Application for Voluntary Departure under the Family Unity Program (Form I-817) to the Service, with the service center director having sole jurisdiction to adjudicate an application for benefits under that program. 8 C.F.R. § 236.14. Benefits under this type of voluntary departure include being permitted to remain in the United States for 2 years following the

approval of the application, and the opportunity to apply for employment authorization. 8 C.F.R. § 236.15. The record reflects that the respondent filed a Form I-817 with the Service, and was granted voluntary departure benefits under the Family Unity Program, including employment authorization (Exh. 4).

The Immigration Judge concluded that an alien granted benefits under the Family Unity Program should be considered to have been admitted into the United States in some status, as required for purposes of cancellation of removal under section 240A(a)(2) of the Act. The Immigration Judge relied on this Board's decision in *Matter of Rosas*, Interim Decision 3384 (BIA 1999), to find that while the respondent was not "admitted" to the United States in the strict sense of the term as it is defined at section 101(a)(13)(A) of the Act because he did not make an entry into the United States after an inspection by an immigration officer, the granting of benefits under the Family Unity Program should be considered an "admission" for purposes of meeting the residency requirements for cancellation of removal. In *Matter of Rosas*, *supra*, we held that an alien who entered the United States without inspection, and subsequently adjusted his status to that of an alien admitted for lawful permanent residence, was deportable for having committed an aggravated felony at any time after admission under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii), despite the fact that the lawful permanent resident alien had not been "admitted" to the United States pursuant to the definition at section 101(a)(13)(A) of the Act. In reaching that conclusion, we read section 101(a)(13)(A) of the Act in conjunction with section 101(a)(20) of the Act, where the phrase "lawfully admitted for permanent residence" is defined, to find that the alien had been convicted of an aggravated felony at any time after admission. *Matter of Rosas*, *supra*, at 3-4. It is important to recognize that our holding in *Matter of Rosas*, *supra*, was based upon the alien therein having been lawfully admitted for permanent residence, and the fact that the term "lawfully admitted for permanent residence" is separately defined at section 101(a)(20) of the Act, and utilized the terms "admitted" or "admission."

During the relevant period when the respondent was granted voluntary departure under the Family Unity Program, he had not yet been lawfully admitted for permanent residence. As such, he cannot be deemed to have been "admitted" to the United States pursuant to our decision in *Matter of Rosas*, *supra*, or under section 101(a)(20) of the Act. Therefore, in order to meet the requirement under section 240A(a)(2) of having resided in the United continuously for 7 years after having been admitted in any status, it is necessary for the respondent to demonstrate that he had been "admitted" according to the definition of that term at section 101(a)(13) or (20) of the Act.

The respondent has not presented evidence that demonstrates that he was "admitted" pursuant to section 101(a)(13) or (20) of the Act, prior to March 22, 1994, when he was lawfully admitted to the United States as a permanent resident. We find that the granting of voluntary departure under the Family Unity Program of IMMACT 90 does not constitute an admission under section 101(a)(13)(A) of the Act. The terms of the Family Unity Program, as enunciated in section 301 of

IMMACT 90, indicate that an immigrant eligible to receive such a temporary stay of deportation and employment authorization must have entered the United States prior to May 5, 1988, have resided in the United States on that date, and not have been lawfully admitted for permanent residence. The requirement that an alien have entered the United States does not mean that the alien had been admitted, as that term is currently defined. At the time of the passage of the Family Unity Program in IMMACT 90, entry was defined as: "any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise . . ." Section 101(a)(13) of the Act (1991). The respondent did not lawfully enter the United States after inspection and authorization of an immigration officer when he was granted voluntary departure under the Family Unity Program. Therefore, we find that he was not "admitted" into the United States until March 22, 1994, when he was lawfully admitted for permanent residence. Accordingly, he has not resided in the United States continuously for 7 years after having been admitted in any status, and is therefore ineligible for cancellation of removal under section 240A(a) of the Act.

We note that the respondent additionally argues that because the respondent was a minor when he illegally came to the United States in 1985, he should be considered to have a lawful domicile in the United States as of May 4, 1988, when his mother was lawfully admitted as a permanent resident. The respondent relies on case law from the United States Court of Appeals for the Ninth Circuit, the circuit in which this case arises. The Ninth Circuit has held that in adjudicating a claim for a waiver under section 212(c) of the Act, a minor child's "lawful unrelinquished domicile" is that of his parents, and that the period of 7 years lawful unrelinquished domicile, when measured for children, does not begin to run when they acquire lawful permanent resident status . *See Lepe-Guitron v. INS*, 16 F.3d 1021, 1024-25 (9th Cir. 1994). As previously stated, a waiver of inadmissibility under section 212(c) of the Act was the predecessor to the present relief of cancellation of removal under section 240A(a) of the Act. *Matter of C-V-T-*, *supra*, at 5. Former section 212(c) of the Act authorized a waiver of inadmissibility for "[a]liens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years." We find without merit the respondent's argument that the Ninth Circuit's holding in *Lepe-Guitron v. INS*, *supra*, applies in this case to find that the respondent has lawfully resided in the United States since May 4, 1988, when his mother was lawfully admitted as a permanent resident. Specifically, the requirement under former section 212(c) of the Act was that an alien be returning to a lawful unrelinquished domicile, while the present requirements for cancellation of removal under section 240A(a) of the Act include that an alien reside continuously in the United States for 7 years after having been admitted in any status. As previously discussed, the respondent had not been "admitted" to the United States under section 101(a)(13)(A) of the Act, therefore, he does not meet the 7-year residence after admission requirement for cancellation of removal, and the Ninth Circuit's holding regarding an alien's "lawful unrelinquished domicile" is inapplicable.

For the foregoing reasons, we find that the respondent has not demonstrated his eligibility for cancellation of removal under section 240A(a) of the Act because he has not resided in the United States continuously for 7 years after having been admitted in any status. *See* section 240A(a)(2) of the Act. Therefore, the Immigration Judge's decision granting the respondent cancellation of removal will be vacated. As the respondent is removable as charged, and has not demonstrated his eligibility for relief from removal, the respondent will be ordered removed from the United States to Mexico, as designated by the respondent at his removal hearing (Tr. at 3).

ORDER: The Service's appeal is sustained.

FURTHER ORDER: The Immigration Judge's order is vacated and the respondent is ordered removed from the United States.

FOR THE BOARD